NO. 47196-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor/Appellant

v.

ROBERT CHARLES JUSTUS; CORINNE M. TOBECK, ESTATE OF JOSEPH "JOEY" TOBECK; VERNON A. TOBECK, and APRIL D. NORMAN,

Plaintiffs/Respondents

v.

WILLIAM D. MORGAN and DONNA L. MORGAN,

Defendants/Respondents,

INTERVENOR STATE FARM FIRE AND CASUALTY COMPANY'S APPELLANT'S REPLY BRIEF

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1. Appellant Fully Participated in the Reasonableness Hearing

Respondent's brief begins with the puzzling assertions that Appellant did not defend against the reasonableness amount (Respondent's brief, p. 2), and that Appellant had an opportunity to present evidence but chose not to do so (Respondent's brief, p. 4). These assertions are plainly rebutted by the record before this Court.

Appellant provided the trial court a brief opposing the reasonableness determination. (CP 373-417) The brief was accompanied and supported by substantial documentary and testimonial evidence. (CP 418-653) Additionally, Appellant's counsel presented both opening and closing arguments at the reasonableness hearing, and questioned witnesses who presented live testimony. (CP 738-739, 754, 844-942) (VRP 8/29/14, VRP 10/16/14) Accordingly, this Court should disregard Respondent's unsupported assertions suggesting that Appellant did not participate in the reasonableness determination.

Similarly, Respondent confusingly argues that Appellant agreed to the trial court's reasonableness determination and "confirmed with the amount the Court does find to be reasonable." (Respondent's brief, p. 4) What Appellant confirmed to the trial court was simply that it understood the settlement amount agreed to between Justus and the Morgans would be modified to conform with the amount the trial court found to be

reasonable.[1] (CP 753) (VRP 11/7/14 at p. 6, lines 14-24). Nothing in the record before this Court establishes that Appellant ever agreed with the trial court's reasonableness determination.

2. Appellant Is Not Challenging the Trial Court's Factual Determinations

As stated in its opening brief, Appellant does not dispute the facts material to the trial court's reasonableness determination, nor is Appellant claiming any error with respect to the trial court's factual determinations. Accordingly, although Respondent's statement of facts adds additional details regarding the events of June 9, 2010, nothing in that statement is at odds with the trial court's factual findings, or with Appellant's summary of those factual findings in its opening brief. Thus, Appellant does not disagree with Respondent's assertions that:

- Mr. Morgan initially confronted Mr. Justus by pointing a handgun at him (Respondent's brief, p. 8)
- Mr. Morgan "didn't reciprocate on a human level of communication with Justus" (Respondent's brief, p. 9)
- Soon after Mr. Justus and Mr. Tobeck got in the truck Mr. Morgan began shooting at them (Respondent's brief, pp. 9-10)

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[1] It is undisputed that, although Mr. Justus and the Morgans agreed to a settlement in the amount of $1.3 million, the trial court found that a reasonable settlement amount was $818,900.

- After the truck hit the tree and Mr. Justus crawled out of the window, "Mr. Morgan confronted Justus again with a pistol right to his face [and] instructed Justus to get on his stomach and put his hand and legs up." (Respondent's brief, pp. 10-11)
- When Justus told Morgan he had just killed his best friend, Morgan's response was "F-you. You just saw what I did to your friend. Don't move." (Respondent's brief, p. 11)

Indeed, these undisputed facts, among others, led to and fully supported the trial court's conclusions that Mr. Morgan's actions were "outrageous" and "beyond the bounds of human decency," and involved "callous disregard for the sanctity of human life" (CP 787-788) (VRP 11/17/14, pp. 8-9), and that the facts of the case were "inflammatory." (CP 788) (VRP 11/17/14, p. 9) Moreover, it is these very facts, highlighted by Respondent, that are wholly inconsistent with the trial court's determination that Mr. Morgan's legal liability rested on a negligence theory.

3. Appellant's Challenge Focuses on Two of the Nine *Chaussee* Factors

As discussed in Appellant's opening brief, the trial court considered the nine criteria described in *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991), in assessing the

reasonableness of the settlement between Mr. Justus and the Morgans. Appellant's challenge to the trial court's reasonableness determination focuses on the trial court's misapplication of two of the nine criteria: the merits of the releasing person's liability theory, and the merits of the released person's defense theory.

Respondent devotes two pages of his brief to two other *Chaussee* factors – any evidence of bad faith, collusion, or fraud, and the releasing parties' injuries and damages. (Respondent's brief, pp. 15-16) However, Appellant is not challenging the trial court's findings regarding Mr. Justus's injuries, as supported by the testimony of Gloria Roettger or Dr. Mark Whitehill. Nor is Appellant challenging the trial court's conclusion that the settlement between Respondent and the Morgans was not animated by bad faith, collusion or fraud. The discussion in Appellant's opening brief regarding the "inherently suspect" nature of stipulated consent judgment settlements was included simply to emphasize how important it is that a court's evaluation of such a settlement critically and objectively consider all applicable *Chaussee* factors in weighing whether the settlement's proponent has met his burden of proof as to reasonableness.

4. The Trial Court Erred in Concluding that Mr. Justus Had A Viable Negligence Claim Against Mr. Morgan

As discussed in Appellant's opening brief, the fatal problem with the trial court's reasonableness determination was its conclusion that the facts supported imposition of legal liability against Mr. Morgan on a negligence theory, even though the undisputed facts before it established that Mr. Morgan's conduct was in all respects intentional and deliberate, not inadvertent. Both the trial court, and Respondent, acknowledge that any intentional tort claims that Respondent might have alleged were time barred because Respondent did not file suit until two years and18 days following the incident. Accordingly, absent a viable negligence claim, Respondent had no legal claim supporting a reasonableness determination anywhere close to $818,900.

A. Mr. Morgan's "Error in Judgment" Does Not Support Imposition of Liability Based in Negligence

Respondent does not contest Appellant's argument that Washington courts have never recognized a claim for "negligent wrongful detention." He makes no effort to respond to Appellant's argument that a claim for unlawful or wrongful detention is a tort substantially equivalent to the torts of false arrest and/or imprisonment. He does not contest that, based on the facts presented to the trial court, the gist of his claim against Mr. Morgan was consistent with these torts. He does not contest that,

under Washington law, a claim for false arrest or false imprisonment is subject to a two-year statute of limitations. He does not distinguish – nor does he even discuss – the authorities cited by Appellant holding that the applicable statute of limitation depends on the essential nature of the claim,[2] and that the inclusion of the term "negligence" in a complaint does not transform otherwise intentional torts into negligence claims.[3]

Rather, Respondent's argument is that, because the sequence of events on June 9, 2010 began with Mr. Morgan's alleged "error in judgment" – specifically, his "error in his assessment that the Plaintiffs were trespassers" – Respondent had a viable negligence claim against Mr. Morgan. Respondent's argument gets him nowhere because it ignores both the distinctions between negligence claims and intentional torts, and principles of proximate cause.

Even if Mr. Morgan was mistaken in his judgment that Respondent and Mr. Tobeck were trespassers and thieves, and that he had a right to hold them at gunpoint until the police arrived, the simple fact is that every one of Mr. Morgan's actions on the night of June 9, 2010 was intentional

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[2] *Boyles v. Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991); *Eastwood v. Cascade Broad. Co.,* 106 Wn.2d 466, 469, 722 P.2d 1295 (1986); *Seely v. Gilbert,* 16 Wn.2d 611, 615, 134 P.2d 710 (1943).

[3] *St. Michelle v. Robinson*, 52 Wn. App. 309, 315-316, 759 P.2d 467, 471 (1988); *Fondren v. Klickitat County,* 79 Wn. App. 850, 853, 863, 905 P.2d 928 (1995); *Dever v. Fowler,* 63 Wn. App. 35, 38, 45, 816 P.2d 1237, 824 P.2d 1237 (1991).

and deliberate, and not inadvertent. These actions included pointing the gun at Respondent and Mr. Tobeck when he initially confronted them, shooting at the cab of their truck repeatedly as they drove away, and then holding Respondent at gunpoint until the police arrived while yelling, "F-you. You just saw what I did to your friend. Don't move." It is impossible to square these objective actions with concepts of negligence. *E.g., Rodriguez v. City of Moses Lake*, 158 Wn.App. 724, 243 P.3d 552 (2010) (negligence conveys the idea of neglect or inadvertence, as distinguished from premeditation or formed intention). Mr. Morgan's unexpressed motivations are not the touchstone for liability; rather, liability is assessed based on his objective actions.

If Respondent's argument was correct, then nearly any intentional tort could be transformed into a negligence claim with a simple statement from the tortfeasor to the effect that, "But I thought that ...." For example, suppose Smith beats up Jones, thinking that Jones had been sleeping with Smith's wife, when in fact Jones was simply a work colleague of Smith's wife who had been working closely with her on an intense and time consuming project. Under Respondent's theory, Smith's assault and battery of Jones would be considered a negligence claim, because Smith was mistaken about Jones's involvement with his wife – or, in Respondent's terms, because Smith had made an "error in judgment" in

his estimation of the relationship between Jones and his wife. No Washington court would ever find a negligence claim under these facts. Here, likewise, the trial court committed clear error when it concluded that Respondent had a negligence claim against Mr. Morgan because of Mr. Morgan's "error in judgment" in his estimation of what Respondent and Mr. Tobeck were up to on the night of the incident.

Likewise, even if Mr. Morgan's "error in judgment" was a negligent act, that error in judgment cannot be considered the proximate cause of Respondent's injuries. The term "proximate cause" means a cause which, in a direct sequence unbroken by any new independent cause, produces the event complained of and without which such event would not have happened. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 85, 18 P.3d 558 (2001) (approving instruction to this effect). Mr. Morgan's "error in judgment" did not cause Respondent's injuries; rather, it was Mr. Morgan's independent and separate actions of pointing and shooting his gun, holding Respondent at gunpoint, and threatening to kill him, that were the proximate cause of Respondent's injuries. Thus, it was these latter acts – not Mr. Morgan's initial error in judgment – that must be considered the relevant proximate cause for purposes of our analysis. And it is beyond dispute that these acts were all intentional and deliberate.

In summary, Respondent's "error in judgment" argument does not support the conclusion that he had a viable negligence claim against Mr. Morgan.

B. Respondent had no Viable "Negligence Per Se" Claim Based on the Concealed Weapon Statute, RCW 9.41.050(1)(a)

Respondent's "negligence per se" argument based on RCW 9.41.050(1)(a) is unsupported factually, and provides no legal support for his assertion that he had a viable negligence claim against Mr. Morgan. The statute provides: "Except in the person's place of abode or fixed place of business, a person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol." As a threshold undisputed factual matter, Mr. Morgan never carried a pistol that was "concealed" on his person. To the contrary, Mr. Morgan brazenly and openly brandished his pistol both when he first confronted Respondent and Mr. Tobeck, and when he held Respondent on the ground while awaiting the arrival of law enforcement. There was nothing "concealed" about Mr. Morgan's use of the pistol.

Additionally, Respondent's "negligence per se" argument suffers from some of the same flaws as his "error in judgment" argument. There was nothing negligent or inadvertent about Mr. Morgan's carrying and use of his pistol; as the record makes clear, he intentionally and deliberately

brandished and fired it repeatedly. Respondent may not re- label Mr. Morgan's intentional, deliberate and open use of the pistol as "negligent" and "concealed" conduct solely to prop up his otherwise unsupported negligence claim. There was no violation of RCW 9.41.050(1)(a), and Mr. Morgan's conduct was deliberate, not negligent.

5. A Claim for Wrongful Detention Is Not Subject to the "Catchall" Statute of Limitations Set Forth in RCW 4.16.080(2)

Respondent's final, unavailing argument is that his claim for "wrongful detention of a person" is subject to the three-year statute of limitations spelled out in RCW 4.16.080(2) because it is a claim for an injury not otherwise enumerated in the various limitations statutes. As discussed previously, Washington courts have never recognized a cause of action for "wrongful detention of a person," but in other jurisdictions, this tort is substantially equivalent to the torts of false arrest and/or imprisonment. Accordingly, based on the reasoning in *Heckart v. Yakima*, 42 Wn. App. 38, 39, 708 P.2d 407 (1985), the claim is subject to the two-year statute of limitations set forth in RCW 4.16.100(1). *Heckart* held that, although a claim for false arrest is not specifically enumerated in any of the limitations statutes, it is subject to RCW 4.16.100(1) because it is substantially similar to false imprisonment, which is one of the enumerated claims subject to that statute. The same reasoning compels the

conclusion that a claim for "wrongful detention of a person" is likewise subject to the two-year statute of limitations set forth in RCW 4.16.080(2).

CONCLUSION

The trial court's determination that Mr. Justus's settlement with the Morgans had a reasonable settlement value of $818,900 should be reversed because it rests on a clearly erroneous legal premise. The evidence before the trial court established that Mr. Morgan's conduct was deliberate and intentional, not inadvertent or neglectful. Any liability premised on intentional conduct was time barred, "negligent unlawful detention" is not a recognized theory of recovery in Washington, and no facts support imposition of liability on a negligence theory. This Court should reverse and remand for reconsideration of the reasonableness determination in light of the clear absence of factual or legal support for Mr. Justus's "negligence" liability theory against the Morgans.

DATED this 5th day of October, 2015.

SOHA & LANG, P.S.

By: *s/Mary R. DeYoung*
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DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
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I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On October 5, 2015, a true and correct copy of **INTERVENOR STATE FARM FIRE AND CASUALTY COMPANY'S APPELLANT'S REPLY BRIEF (with attached Declaration of Service)** was served on parties in this action as indicated:

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Executed on this 5th day of October, 2015, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

s/Debbie Low
Debbie Low Secretary to
Mary R. DeYoung